IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin, and Helene N. White

CITY OF TAYLOR,

Plaintiff-Appellee,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellant.

_____/

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
No. 02-221723-CZ

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION

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JURISDICTIONAL STATEMENT AND AUTHORITY FOR FILING *AMICUS CURIAE* BRIEF

Amicus Curiae the Michigan Municipal League ("MML") and the Michigan Townships Association ("MTA") state that the Court has jurisdiction of this appeal pursuant to MCR 7.301 and MCR 7.302. Defendant-Appellant The Detroit Edison Company timely sought leave to appeal from the Michigan Court of Appeals' decision in favor of the City of Taylor issued on September 14, 2004 by the filing of an application with the Court on December 9, 2004. This Court granted the application in an Order issued on October 6, 2005. The MML and the MTA further state that the Court has jurisdiction and authority to consider this brief pursuant to MCR 7.306(D) and subject to the Court's granting of the MML/MTA's motion for leave to file *amicus curiae* brief, which motion is filed contemporaneously herein.

STATEMENT OF INTEREST

The Michigan Municipal League is the Michigan association of cities and villages. The MML is one of the oldest associations of its kind in the nation. With membership comprised of approximately 511 cities and villages, the MML represents more than 98 percent of Michigan's urban population.

The MML is a nonpartisan organization working through cooperative effort to strengthen the quality of municipal government and administration by providing technical assistance and information to local officials regarding municipal issues; improving the training and education of these officials; preserving the home rule philosophy of municipal government, and creating a greater public understanding of municipal responsibilities, governance, and administration. The MML is supported by membership dues of the cities and villages of the state, which belong to the organization on a voluntary basis, and revenue from the sale of special services.

Approximately 430 of the MML members belong to the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This *amicus curiae* brief is authorized by the Legal Defense Fund's board of directors whose membership includes: The president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys: William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage; Ruth Carter, corporation counsel, Detroit; Peter Doren, city attorney, Traverse City; Andrew J.

Mulder, city attorney, Holland; Clyde Robinson, city attorney, Battle Creek; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney Big Rapids; Lori Grigg Bluhm, city attorney, Troy; Stephen Postema, city attorney, Ann Arbor, and William C. Mathewson, the MML's General Counsel.

The Michigan Townships Association is a Michigan nonprofit corporation whose membership consists of in excess of 1,235 townships in the state of Michigan. Organized in 1953, the MTA has grown to become the largest local government association in Michigan and one of the largest in the United States. More than 6,500 elected township officials rely on the MTA to not only effectively champion local authority, but to also help them build the capacity to serve their growing populations efficiently, effectively and economically.

The MTA is governed by a board of directors which is comprised of elected township officials who are elected every four years. The board of directors hires an executive director, adopts legislative policies, and oversees MTA services and finances. The MTA Board of Directors and staff are committed to helping township officials govern their communities more efficiently and improve the services they provide to Michigan's four million-plus township residents. Through seminars, publications, county chapters, telephone inquiries, and written and electronic communications, the MTA alerts members to current township issues. The MTA also promotes legislation favorable to its members and maintains constant communication with state and federal officials, whose actions play a critical role in township operations. The MTA, on behalf of Michigan townships, is also interested in litigation of statewide significance.

The MML and the MTA submit this *amicus curiae* brief in support of the affirmance of the Court of Appeals' decision in favor of Plaintiff-Appellee City of Taylor. The legal ramifications of this decision far exceed the limited issue of liability for utility relocation expenses in a heavily congested business district, and extend to a municipality's fundamental constitutional right to exercise reasonable control over its streets and right-of-ways and to exercise its police powers. For over a century, municipalities throughout Michigan have relied on their constitutional powers to govern their citizens, establish zoning requirements, develop their cities, plan for future growth, draft ordinances for future governance, and establish budgets. The fundamental right of a municipality to reasonable control over its streets was so important that one hundred years ago it was included in Michigan's 1908 Constitution to ensure that state legislative attempts would not deprive local governments of the right to control their own streets and public places. By this appeal, Appellant Detroit Edison is attempting to eviscerate that fundamental constitutional right and curtail police powers. The MML and the MTA have a significant interest in this case because the Court's decision will have an impact on each one of their 511 member cities and villages and 1,235 member townships for years to come.

STATEMENT OF QUESTIONS PRESENTED

I. ARE MUNICIPALITIES CONSTITUTIONALLY AUTHORIZED TO PASS AN ORDINANCE TO REGULATE UTILITY LINES AND RELATED EQUIPMENT IN CITY STREETS INCLUDING REQUIRING RELOCATION OF LINES AND EQUIPMENT AT THE UTILITY'S EXPENSE?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

Amicus Curiae MML and MTA answer "Yes."

II. DOES A CITY'S REASONABLE POLICE POWER EXTEND TO REQUIRING A UTILITY TO RELOCATE ITS LINES AND EQUIPMENT AND PAY THE ASSOCIATED EXPENSES?

The Defendant-Appellant Detroit Edison Company answers "No."

The Plaintiff-Appellee City of Taylor answers "Yes."

The Court of Appeals answers "Yes."

The Wayne County Circuit Court answers "Yes."

Amicus Curiae MML and MTA answer "Yes."

III. DOES THE AUTHORITY GRANTED TO THE MPSC BY THE LEGISLATURE ABROGATE THE CONSTITUTIONAL AND STATUTORY RIGHTS GRANTED TO MUNICIPALITIES TO REASONABLE CONTROL OF THEIR STREETS?

The Defendant-Appellant Detroit Edison Company answers "Yes."

The Plaintiff-Appellee City of Taylor answers "No."

The Court of Appeals answers "No."

The Wayne County Circuit Court answers "No."

Amicus Curiae MML and MTA answer "No."

STATEMENT OF FACTS

The Michigan Municipal League and the Michigan Townships Association hereby adopt and incorporate herein the thorough Counterstatement of Facts set forth at pages 1 through 13 of the Brief on Appeal of the Plaintiff-Appellee City of Taylor, Michigan previously filed in this matter, along with Appellee's Appendix and the documents contained therein.

SUMMARY OF ARGUMENTS

Michigan's municipalities create and maintain public streets and right-of-ways at great expense for the benefit of all the traveling public, not just those who live in any one village, city or township. A municipality's constitutional authority to exercise reasonable control over its streets is expressly provided in Const 1963, art 7, § 29 and has been part of this state's constitutional framework for almost one hundred years. Further, Michigan law provides cities with reasonable police power over their streets and right-of-ways. The right of reasonable control extends to the decision to allow a public utility into a right-of-way, to dictate the placement of its lines and equipment, to require changes in the event a municipal improvement project or the public safety warrants a change, and to require the utility to bear its own costs associated with relocating its own lines, equipment and related facilities.

The Michigan Public Service Commission is an administrative agency with limited jurisdiction, as set forth in MCLA 460.6(1), to regulate public utilities in the State, except a municipally owned utility, and "except as otherwise provided by law." Appellant Detroit Edison ignores this limiting language and argues incorrectly that the MPSC has authority to rule on all issues relating to public utilities, including a municipality's right to exercise reasonable control over its streets and right-of-ways. The MPSC does not have jurisdiction to rule on the constitutional rights of Michigan's cities, which should be left to the courts.

Finally, Appellant Detroit Edison's doomsday predictions, and those of its supporters, regarding the likelihood of massive utility relocation requests in the event the Court of Appeals' decision is affirmed are fantastic. The City of Taylor project on Telegraph

Road, like other major public improvement projects, required significant public funds and involved major disruption of vehicular and pedestrian traffic and interference with local businesses. Michigan's municipalities, in large part, do not have the finances to fund major improvement projects, regardless of whether utility relocation expenses are paid by the utility or not. For that reason, there has not been and there will not be a significant increase in utility relocation requests if the Court properly affirms the Court of Appeals' decision in this matter.

The Court should affirm the broad authority granted by the Michigan Constitution to Michigan's municipalities to reasonable control over their streets and right-of-ways. To the extent that the Court wishes to adopt a narrower holding in this matter, the Court should find that "reasonable" control includes a city's right to require a utility to relocate its lines and related facilities at the utility's expense when the requested relocation of utilities is part of a major public improvement project in a heavily congested business district motivated by public health, safety and welfare concerns.

STANDARD OF REVIEW

Constitutional and statutory issues are subject to *de novo* review. *County of Wayne* v *Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004); *Cox* v *Flint Board of Hospital Managers*, 467 Mich 1, 16; 651 NW2d 356 (2002). Questions of law in general are reviewed de novo. *National Wildlife Federation* v *Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). A trial court's ruling to either grant or deny a motion for summary disposition is also reviewed de novo. *Kreiner* v *Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A circuit court's decision concerning whether to defer to an agency's primary jurisdiction is reviewed to determine whether the case could be more appropriately resolved by an administrative agency because the dispute requires the "resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Travelers Ins Co* v *Detroit Edison Co*, 465 Mich 185, 206; 631 NW2d 733 (2001).

ARGUMENT

I. CONST 1963, ART 7, § 29 PROTECTS A MUNICIPALITY'S RIGHT TO ENACT ORDINANCES REQUIRING A UTILITY OPERATING WITHIN THE CITY'S RIGHT-OF-WAY TO RELOCATE ITS UTILITY STRUCTURES AND TO PAY FOR THE RELATED EXPENSES

The Michigan Constitution, specifically Const 1963, art 7, § 29, grants local governments the right to reasonable control of the highways, streets, alleys and other public places of the local government. Article 7, § 29 of the 1963 Michigan Constitution provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracts, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, art 7, § 29.

Article 7, § 29 is nearly identical to the 1908 provision which granted this fundamental right with the addition of the phrase "[e]xcept as otherwise provided in this constitution" before the sentence that confers on cities a right to reasonable control of their streets, alleys, and public places. Const 1963, art 7, § 29.

The application of the constitutional provision at issue requires judicial construction of the phrase "reasonable control." The primary function of judicial construction is to ascertain the purpose and the intent of the provision at issue. In reviewing a constitutional provision, the intent is that of the individuals who adopted the constitutional provision at issue. *Straus* v *Governor*, 459 Mich 526; 592 NW2d 53 (1999). Courts, however, also will

look at the text's natural and common meaning, strictly construed and limited to the objects fairly within its terms. *Clearwater Twp* v *Kalkaska Co Bd of Supervisors*, 187 Mich 516; 153 NW 824 (1915). While a court will focus on the actual language used, it is not the meaning of particular words in the abstract, but rather the application of those words within general scope of the provision that controls. *See Livingston County* v *Dept of Management & Budget*, 430 Mich 635; 425 NW2d 65 (1988). With regard to intent, the MML and the MTA adopt the City of Taylor's thorough and accurate analysis of the intent underlying the adoption of both Article 7, § 29 and its predecessor. *See* Appellee City of Taylor's Brief on Appeal, pp 19-27.

In light of the intent of the ratifiers of the provision as well as its common meaning, the use of the word "reasonable" clearly defines the outer limit of a municipality's right to control its streets. Thus, a local ordinance that attempts to control local public streets is within the constitutionally-protected sphere of activity so long as it is reasonable.

A city's right of "reasonable control" of highways within its city limits is among those municipal powers which "shall be liberally construed in [its] favor," and is deemed "by law [to] include" additional powers "fairly implied and not prohibited by this Constitution." *Howell Twp* v *Rooto Corp*, 258 Mich App 470; 670 NW2d 713 (2003); Const 1963, art 7, § 34. *See also City of Livonia* v *Dept of Social Services*, 423 Mich 466; 378 NW2d 402 (1985) ("Once a power has been granted to a political subdivision, it should not be artificially limited"). This municipal right is only limited by reasonableness to protect the authority of local governments from attempts of future legislatures to deprive municipalities of their rights to control their own streets.

The boundaries of this right of reasonable control may be further defined through an examination of the case law interpreting both the present day Article 7, § 29 and its predecessor in the 1908 Constitution. In *People* v *McGraw*, 184 Mich 233; 150 NW2d 836 (1915), the Court, in reviewing city traffic ordinances, explained that state laws which attempt to take away from cities all control of their highways and which forbid the cities from exercising reasonable control must be held to be unconstitutional and void. The *McGraw* court's construction of "reasonable control" also provided that a municipality may pass ordinances, which do not contravene state laws, regarding local and peculiar conditions. *Id.*

In *City of Kalamazoo* v *Titus*, 208 Mich 252; 175 NW2d 480 (1919), this Court struck down an ordinance of the City of Kalamazoo which sought to fix the price of utility service. In reviewing the reasonable control provision, the Court explained that it is beyond question that a municipality has the power to exercise reasonable control of the streets, alleys, and public places within its limits. *Id.* Further, this Court observed that the reasonable control of highways preserved by the Constitution to cities, villages, and townships includes the proper exercise of the police power within the territorial limits of the municipality. *Id.* In that case, the ordinance was unreasonable because it attempted to regulate the utility outside the city limits, as well as inside such limits. *Id.*

The *McGraw* and *Titus* cases illustrate that a primary boundary of a local government's reasonable control is the local government's territorial limits. Although a municipality may reasonably control its streets by ordinance, if an ordinance requires compliance both within and outside the municipality's physical boundaries, the ordinance

exceeds its authority. *See also North Star Line* v *Grand Rapids*, 259 Mich 654, 664; 244 NW 192 (1932), (holding that a city may not exercise rate making powers over public utilities), *City of Niles* v *Michigan Gas & Electric Co*, 273 Mich 255, 264; 262 NW 900 (1935).

Detroit Edison's reliance on *City of Center Line* v *Michigan Bell Telephone Co*, 387 Mich 260; 196 NW2d 144 (1972) (Reply Brief, p. 5) is misplaced. The Court's holding in *City of Center Line* related to definitions under the Rehabilitation of Blighted Areas Act, 1945 P.A. 344, not the fundamental constitutional issues presented in this case. Indeed, this Court in *City of Center Line* specifically refused to reach the constitutional issue of whether it is necessary to reimburse a utility for relocation costs when a public use entails the removal and relocation of equipment. *City of Center Line*, 387 Mich at 266.

In the instant case, the City of Taylor ordinance applies only to the utilities' use of the right-of-way in a heavily-congested business district. The ordinance does not require that Detroit Edison comply by undergrounding outside of the city's physical boundaries in order to comply. Nor does the ordinance in any way attempt to dictate how Detroit Edison sets its rates or distributes its costs of doing business either within or outside of the City of Taylor. This reading of the local government's fundamental right to reasonable control is consistent with both the constitutional text as well as precedent.

Even if this Court limits municipal authority of its streets to only matters of purely local concern, the placement of utility structures within a local street, highway, or alley would remain under municipal control. For example, the Court has acknowledged that a city may permissibly regulate the operations of cabs and jitneys within its borders,

Melconian v *Grand Rapids*, 218 Mich 397; 188 NW 521 (1922), or establish a system of parking meters on public streets, *Bowers* v *Muskegon*, 305 Mich 676; 9 NW2d 889 (1943), or require a utility to bear the expense of removal and relocation of electric poles in order to facilitate installation of a sewer. *Detroit Edison* v *Detroit*, 332 Mich 348; 51 NW 245 (1952). Further, this Court explained in *North Star Line* v *Grand Rapids*, 259 Mich 654, 665; 244 NW 192 (1932) that a city may properly regulate the routes of intracity buses, the rate of speed on city streets, parking regulations, and designate places for receiving and discharging passengers, among other things. Detroit Edison has failed to differentiate these properly-regulated concerns from regulation of the placement of its facilities in this case. Although there may be state and federal regulation regarding utility transmissions, these regulations do not and can not address the local concerns that must be weighed in placement of utility structures within a street either through poles or undergrounding.

In addition, this reading of the city's right of reasonable control is consistent with existing statutory authorities. For example, pursuant to MCL 117.4h, each city may in its charter provide for the use of property located in streets, alleys and public places, by a public utility. The City of Taylor did so in its Ordinance, § 18.2(a), (Appellee's Apx 8b-9b) by which the city retained the right to regulate public utilities, regulate the location of poles and other facilities, and require lines and wiring to be placed underground. Similarly, MCL 460.553 provides that any corporation engaged in the business of transmitting and supplying electricity with the consent of the municipality through which it operates has the right to use the highways, streets, alleys and other public places. This section specifically states that "[N]othing herein contained shall be construed to impair any right possessed by

any village or township to the reasonable control of its streets, alleys and public places in all matters of mere local concern." MCL 460.553. Each of these statutes demonstrates the legislature's effort to respect the constitutionally-mandated right of a municipality to control the use of its streets.

Moreover, by affirming the Court of Appeals decision, this Court will be acting consistently with other jurisdictions that have recognized local authority to regulate utility line placement despite statewide regulation of the utilities by a state regulatory commission. *See US West Communications, Inc* v *City of Longmont*, 948 P2d 509 (Colo 1997) (upholding as a reasonable exercise of municipal authority a municipal ordinance that requires a utility to relocate and underground its lines at the utility's expense); *City of Geneseo* v *Illinois N Utils Co*, 39 NE2d 26 (Ill 1941) (requiring a utility to removes its inoperational lines); *City of Edmonds* v *General Tel Co*, 584 P2d 458 (Wash Ct App 1978) (upholding a municipal regulation that requires a utility to underground its lines at its own expense).

For example, in *Northern States Power Co* v *City of Oakdale*, 588 NW2d 534, the Minnesota Court of Appeals upheld a municipal ordinance that required undergrounding of electrical service. Notably, the Minnesota Court observed that utility poles in close proximity to streets increase the likelihood of injuries resulting from traffic accidents and that downed lines as a result of ice and wind storms present a hazard both on the ground and to the safety and welfare of people in their homes due to loss of power in the winter months. *Id.* at 542. These matters of local concern further supported the local government's propriety in adopting an ordinance requiring undergrounding at the utility's

expense. These same public safety and other concerns are equally present in the City of Taylor as well as communities throughout Michigan.

The right of cities, villages and townships to reasonably control their streets, alleys and public places is a right that has been constitutionally granted since 1908. Since that time, local governments have relied on this authority to enact regulations for the general welfare of its population. Townships, villages, and other local governments have relied on longstanding precedent that has continually affirmed their authority over public rights-of-way in their communities. This longstanding precedent has shaped how municipalities plan and budget for projects that involve rights of way; how municipalities apply and enforce local regulations relating to their streets; and how municipalities negotiate for public works projects and grant easements. The pervasiveness of this power and authority at the local level, even if limited to matters of local concern, is elemental to local government. The complete change in position on this issue sought by Detroit Edison is irreconcilable with the constitutional text and would undermine all the longstanding precedents on which local governments have long relied

II. THE AUTHORITY GRANTED TO THE MPSC BY THE LEGISLATURE IS LIMITED AND DOES NOT ABROGATE THE CONSTITUTIONAL AND STATUTORY RIGHTS GRANTED TO MUNICIPALITIES TO REASONABLE CONTROL OF THEIR STREETS

Although the MML and the MTA defer to and adopt the arguments set forth in the City of Taylor's Brief on Appeal on the issues of preemption, primary jurisdiction, and MPSC authority, the issues of the MPSC's limited jurisdiction and the fundamental constitutional rights of municipalities to reasonable control over their streets is so

important to MML and MTA members that further discussion is warranted and is set forth below.

Under MCLA 460.6(1), although the MPSC is vested with jurisdiction to regulate all public utilities in Michigan, unless owned by a municipality, the jurisdiction is not unlimited. As stated in MCLA 460.6(1), the MPSC's authority is limited "as otherwise provided by law":

> The Public Service Commission is vested with complete power and jurisdiction to regulate all public utilities in the State except a municipally owned utility, the owner of a renewable power production company as provided in Section 6d, and except as otherwise provided by law. The Public Service Commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The Public Service Commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas and pipeline companies; motor carriers; and all public transportation and communication agencies other than railroads and railroad companies. (emphasis supplied).

The language, "except as otherwise provided by law," includes the Michigan Constitution, art 7, § 29, and Michigan statutes, MCLA 117.4(h) and MCLA 247.185. These sources of "law" grant municipalities the authority to require the relocation of utility lines within their right-of-ways. MCLA 460.6(1) gives the MPSC broad authority to regulate utilities, and not regulate municipalities or limit their rights. Indeed, nothing in the statute speaks to limiting constitutional rights granted to municipalities in Const 1963, art 7, § 29 or otherwise. In fact, the statute provides the exact opposite by reserving the exception, "as otherwise provided by law."

It is well accepted that utilities, such as Detroit Edison, do not have the right to forever maintain their equipment at a particular location. See e.g. *Detroit Edison* v *Detroit*, 332 Mich 348; 51 NW2d 245 (1952) ; *Detroit Edison* v *SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987); *Pontiac* v *Consumers Power*, 101 Mich App 450, 453; 300 NW2d 594 (1980) *lv den* 410 Mich 908; 302 NW2d 845 (1981). Further, a municipality has the right to control the location and route of electric power lines. *Detroit Edison* v *Richmond Twp*, 150 Mich App 40, 47, 50; 388 NW2d 296 (1986).

Detroit Edison and its supporters, including members of the so-called Electric Industry, Consumers Energy Company, the Michigan Electric and Gas Association, and the Michigan Electric Cooperative Association argue that the ordinance in the City of Taylor unreasonably interferes with the rules and regulations adopted by the MPSC. Electric Industry *Amicus Curiae* Brief, pages 15-16. They further argue that the ordinance unreasonably interferes with the MPSC's tariffs. *Id.* at 17-20. The Electric Industry position is best described by the Industry itself:

> The MPSC rules for underground electric lines and the MPSC approved tariff provisions of utilities implementing those rules specify when underground location is necessary and when it is not.

Electric Industry brief, page 18. Detroit Edison also takes this bold position, stating that "[t]he MPSC's Rules and Tariff provisions establish what is reasonable, and bind both Edison and the City." Detroit Edison Reply Brief, p. 5.

Essentially Detroit Edison and The Electric Industry argue that the MPSC should be the final arbiter regarding when undergrounding is reasonable – in effect, completely emasculating the constitutional rights guaranteed to municipalities of reasonable control

over their streets and right-of-ways and taking away the home rule authority given to municipalities to make this decision. This argument further completely ignores the language in MCLA 460.6(1) which confers only limited jurisdiction on the MPSC since the authority is subject to "except as otherwise provided by law."

The MPSC Rules are also not dispositive of the issues here. Detroit Edison is incorrect when it argues that MPSC Rule 460.516 "directly controls the proper outcome in this case." Appellant's Brief in Appeal, p. 20. The MPSC also takes the position that MPSC Rule 460.516 governs the instant facts and is directly in conflict with the City of Taylor's ordinance.

MPSC Rule 460.516 provides:

> Rule 6.(1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.
>
> (2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities, including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs, and flowers.

By its terms, Rule 460.516 only applies when a "customer" requests or otherwise exercises its option to replace existing overheard residential, commercial, and/or industrial distribution and service lines with underground facilities. Although the City of Taylor uses electrical power along Telegraph Road, it does so in its exercise of a governmental function, not for a proprietary purpose. The two roles, governmental and proprietary, are distinct ones. As stated by this Court in *Boerth* v *Detroit City Gas Co*, 152 Mich 654; 116 NW 628,

630 (1908), citing *Illinois Trust & Savings Bank* v *City of Arkansas, City*, 76 Fed 271; 22 CCA 171; 34 LRA 518:

> A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality.

See, also, *Stevens* v *City of Muskegon*, 111 Mich 72, 78; 69 NW 227, 229 (1896).

Detroit Edison fails to recognize this distinction and, in fact, argues incorrectly that the governmental function/proprietary function distinction is a "tort concept" with no relevance to the instant dispute. Detroit Edison Reply Brief, p. 5. Although the governmental function/proprietary function has traditionally been used to determine common law sovereign immunity and, under current statute, governmental immunity, the distinction is a basic one of government law. It has been used frequently to recognize the dual character of municipal corporations and, in the context of this case, was used properly by the Court of Appeals below to determine whether the relocation costs were properly the responsibility of the utility, since the relocation was the result of the City of Taylor exercising a governmental, not proprietary, function.

The MML and the MTA further submit that the City is not a "customer" in this case under Rule 460.516 as it relates to the City's request for the relocation of utility lines and facilities. The City of Taylor was not acting as a customer when it requested the lines be relocated, but pursuant to its constitutional right to reasonable control over its streets and pursuant to its police power as a municipality on behalf of the general public. The

distinction is not meaningless and, indeed, dovetails perfectly with the governmental function/proprietary function test utilized consistently by the courts in this area.

It appears that Detroit Edison agrees, yet attempts to get around this flaw in Appellant's argument by calling the City an "effective" customer. Detroit Edison Brief on Appeal, pp 21-22. As previously noted, however, the fact that the City uses electric power on Telegraph Road does not change the nature of the City's request, which was in the context of a city completing a large public improvement project to improve public safety along Telegraph Road, not in the City's capacity as a customer/consumer of electrical services. It is submitted that a "customer," in this context, refers to a consumer of electrical services who, in that capacity, requests that utility lines be relocated. For example, if a company that operates a manufacturing facility, or a municipality exercising a proprietary function, requests that electrical lines be relocated for its own benefit, then it would appear that MPSC Rule 460.516 may be applicable.

With regard to the governmental function/proprietary function test utilized by the Court of Appeals below, municipalities are entitled to predictability in this area. The governmental function/proprietary function test has been used and applied numerous times before, and the lower court rulings merely affirmed established law in Michigan. The established test has not led to a rash of undergrounding ordinances across the state, and municipalities have planned and budgeted based on how relocation costs have been allocated under this established test, which is a direct function of the nature and type of public improvement project.

The MPSC clearly anticipated that, at times, lines will be required to be placed underground for public safety reasons. MPSC Rule 460.517 provides:

> Rule 7. The utility shall bear the cost of construction where electric facilities are placed underground at the option of the utility for its own convenience or where underground construction is required by ordinance in heavily congested business districts (emphasis supplied).

Detroit Edison maintains that the Court of Appeals' citation to Rule 460.517 was in error. The Court of Appeals, however, merely cited to Rule 460.517 for the proposition that the existence of the rule, in and of itself, suggests that the MPSC regulatory scheme does not support total preemption in that it contemplates that municipalities will pass ordinances in certain situations; for example, when public safety requires it in heavily congested business districts. Detroit Edison discounts this rule, however, by taking the position that Rule 460.517 "governs only the initial construction of underground facilities, not the replacement of existing overhead facilities with underground facilities." (Emphasis in original). Detroit Edison's Brief on Appeal, p. 21. Nowhere in the rule does it state that the rule is limited to initial construction.

Furthermore, Detroit Edison's reading of the rule seems illogical in that initial construction would normally not be needed in a heavily congested business district, since that area would presumably already be served with existing utilities. Any change, therefore, would be a relocation and require the utility to bear the expense. Rule 460.517 supports the City of Taylor and confirms that the utility must pay the costs associated with undergrounding when required to do so pursuant to an ordinance.

The MML and the MTA further submit that the MPSC is not the appropriate forum to consider and rule upon fundamental constitutional rights issues that should be left to the

courts. The MPSC is too closely aligned with utilities and their industries to fairly and critically rule on disputes between municipalities and the utilities regarding such fundamental questions as those at issue here. See, e.g., *Detroit Edison* v *Wixom*, 10 Mich App 218; 159 NW2d 230 (1968) *rev'd on other grounds* 382 Mich 673, 682-683; 172 NW2d 382 (1969). The MPSC is best suited to address rate making issues, distribution system extensions, and other matters of a true regulatory nature.

III. THE MERE POSSIBILITY THAT UTILITY RELOCATION EXPENSES MAY RESULT IN INCREASED UTILITY RATES IS NOT A SUFFICIENT BASIS TO CONFER JURISDICTION ON THE MPSC

In its *amicus curiae* brief, the MPSC does not suggest that the City of Taylor's ordinance conflicts with a specific rule or tariff. Rather, the MPSC asserts that the mere fact that the ordinance results in the utility being required to absorb the cost of relocating the utility lines "is impermissible because its ordinance directly conflicts with the MPSC's broad regulatory authority over utilities." *Amicus Curiae* Brief of MPSC Supporting Appellant, p 7. The MPSC, therefore, takes the inflexible approach that a regulation that requires a utility to expend costs to comply is preempted because the MPSC has occupied the field. This is an extremely broad position and one that has never before been adopted by a Michigan appellate court.

Although the MPSC points to its own rules governing underground electric services for the proposition that it occupies the field, these rules have previously been deemed to deal with the relationship between customers and the utility, not to exempt the utility from a municipality's reasonable police power measures. There is no logical stopping point for the MPSC's argument: the boldness of the industry in seeking blanket immunity is clear.

If accepted, it would preclude local regulation of utilities in other areas, such as environmental requirements, zoning requirements, and building and planning, since those regulations would certainly impact the utilities and, arguably, effect rates.

Consumers Energy and other members of the so-called Electric Industry claim that the cost of overhead is recovered through the life of asset depreciation and return in utility rate structure. Therefore, the utilities argue that undergrounding of overhead lines forces premature retirement of those facilities, thereby creating a serious issue regarding the appropriate rate treatment for unrecovered capital costs for the removed system. The City of Taylor's ordinance, however, does not attempt to indicate how the utility should seek to recover its relocation costs or whether the additional expense associated with the limited instances where relocation will be required will simply result in a lower profit for those utilities. Detroit Edison, in its Brief on Appeal, fails to discuss how the utility attempted to recover its costs for the movement of overhead lines in the various City of Detroit cases, namely, *Detroit Edison Co* v *Detroit*, 208 Mich App 26; 527 NW2d 9 (1994), *Detroit Edison Co* v *Detroit*, 332 Mich 348; 51 NW2d 245 (1952), *Detroit Edison Co* v *SEMTA*, 161 Mich App 28; 410 NW2d 295 (1987), and *Detroit Edison Co* v *Detroit*, 180 Mich App 145; 446 NW2d 615 (1989). Further, Detroit Edison does not address anywhere what efforts, if any, it made before the MPSC to attempt to recover its costs in rate-making proceedings related to the People Mover, Cobo Hall, or other public improvement projects cited above.[1] The failure of Detroit Edison to do so may be explained by the fact that the cost of

[1] It is also interesting to note that Detroit Edison failed to raise the MPSC primary jurisdiction issue in the City of Detroit cases given the fact that the MPSC rules on which appellant now relies were in place at the time, as were the Detroit Edison tariffs.

undergrounding in the few instances where it has been required by ordinance has had minimal impact on Detroit Edison's bottom line. If and when undergrounding becomes a major factor in Detroit Edison's ability to provide services, the solution is for Detroit Edison to seek relief before the MPSC for increased rates, if it so chooses, rather than impairing a municipality's constitutional rights to govern its own streets.

IV. AFFIRMING THE COURT OF APPEALS' DECISION WILL NOT RESULT IN A FLOOD OF MUNICIPAL IMPROVEMENT PROJECTS OR UTILITY RELOCATION REQUESTS

Defendant-Appellant Detroit Edison Company and its supporters have painted a doomsday scenario to convince the Court that the Court of Appeals' decision should be overturned. The proffered argument is that the decision below, if affirmed, will result in a massive onslaught of utility relocation requests by municipalities throughout the state to force the relocation of utility lines from their present positions to underground locations, thereby resulting in massive increases in utility costs and regulatory turmoil. For example:

> The City's Ordinance No. 00-344 attempts to exempt the City from the MPSC's uniform, statewide utility regulation, and the lower courts' opinions invite all municipalities in Michigan to similarly demand extensive, unnecessary underground replacement of utility lines at no cost to themselves. The MPSC's rules and tariffs are designed to prevent this exact type of wasteful expense, and unreasonable cost shifting from the City's taxpayers (who directly benefit from the underground replacement) to the utility's ratepayers (most of whom would not benefit at all). This case involves costs of over $14.5 million for only 4 miles of underground replacement (174a-181a). Such expenses would impose a massive burden for utilities, and ultimately a massive expense for their ratepayers.

Brief on Appeal – Appellant The Detroit Edison Company, p. 38.

> If all the cities, townships and villages in Michigan enacted their own ordinances mandating that the utilities pay for the burial of existing overhead utility lines, there could be a multitude of applications to the MPSC

> from utilities to increase rates to cover the extraordinary expense of burying such facilities.

Amicus Curiae Brief of MPSC Supporting Appellant, p. 15.

> The case below involves a four-mile stretch of Telegraph Road in Taylor. Yet, the case has enormous potential effect for those more than 100,000 miles of telecommunications lines located in public rights-of-ways across Michigan.
>
> * * *
>
> Absent action by the Supreme Court, there would be nothing to prevent each of the hundreds of municipalities in Michigan from following Taylor's lead. The aggregate costs to TAM members and the customers they serve of such relocation expenses could be in the tens of billions of dollars.

Amicus Curiae Brief of The Telecommunications Association of Michigan in Support of Appellant, pp. 1-2.

> Unless reversed, the challenged Taylor ordinance and the lower court Rulings will provide precedent for countless other municipalities to adopt similar ordinances. These actions will seek to impose local aesthetic improvement costs on utilities and utility customers and waste valuable existing electric system assets by unnecessarily replacing them, without any evaluation or involvement of the agency responsible for electric matters.
>
> * * *
>
> These are times of great concern over increased energy costs and particularly the impact of those struggling to pay bills as the state faces economic uncertainty.

Brief of Michigan Electric Industry as *Amicus Curiae* in Support of Defendant-Appellant The Detroit Edison Company, p. 23.

> The Court should not ignore the large financial impact of the Taylor ordinance (and similarly adopted ordinances) and the impact on statewide utility regulatory policy and rates. The challenged Taylor ordinance and the lower court decisions, if left in place, will provide the precedent for countless other municipalities to adopt similar ordinances. These actions will impose local aesthetic improvement costs on utilities and utility customers and waste valuable existing electric system assets by unnecessarily replacing them, without any evaluation or involvement of the statewide regulatory agency.

> Although there is no "free lunch," since someone must pay the relocation costs, municipalities are likely to be tempted to dine, believing that by mere stroke of the pen and vote they can transfer all of the costs to others.

Joint Motion for Leave to File *Amicus Curiae* Brief in Support of Application for Leave of Electric Industry, including Consumer Energy Company and the Michigan Electric Cooperative Association, p. 4.

The reality, however, is that there has not yet been in the past and there will not be in the future a mad rush to relocate utilities if the Court of Appeals' decision is affirmed. First and foremost, the expenses associated with relocation of utilities, even if lines are required to be placed underground, are just a portion of the overall cost of any given municipal improvement project.

The suggestion that "municipalities are likely to be tempted to dine, believing that by mere stroke of the pen and vote they can transfer all of the costs to others" (emphasis supplied) is not based on reality. The fact is that most Michigan cities and villages are financially strapped and are not electing to commence public improvement projects, regardless of whether or not some portion related to utility relocation expenses is paid by the utility or someone else. Since most municipalities cannot pay for their respective portions of public improvement projects, there is no big movement across the state to commence massive public improvement projects or relocate utility lines underground.

Secondly, aside from the lack of public monies to commence large public improvement projects, simply wanting to relocate public utility lines for proprietary reasons is not a sufficient legal basis to place relocation costs on the utility under the established governmental function/proprietary function test. The Court of Appeals below applied a

general rule that it has repeatedly articulated in prior cases, namely that relocation costs may only be imposed on the utility if necessitated by the municipality's discharge of a governmental function, while the expenses must be borne by the municipality if necessitated by its discharge of a proprietary function. *City of Taylor* v *Detroit Edison Co*, 263 Mich App 551; 689 NW2d 482 (2004), citing *Detroit Edison* v *Detroit*, 208 Mich App 26, 30; 527 NW2d 9 (1994).

The City of Taylor project, for example, did not involve mere beautification, but rather consisted of a major reconstruction of four miles of Telegraph Road in the city of Taylor. As set forth in the City's Telegraph Relocation Ordinance, enacted May 16, 2000, the project involved reconstructing northbound and southbound traffic lanes, construction of acceleration/deceleration and turn around lanes, installation of new water mains, fire hydrants, and sewers, construction of median irrigation, placement of streetlights, relocation of curbs and curb cuts, upgrading drainage, and other improvements. The elimination of utility poles and the relocation of lines and related facilities was part of the overall public improvement project, which had numerous governmental functions related to public safety, including to enhance traffic operational safety in the City, to improve visibility, sight lines, and eliminate vehicular accident impacts on poles, overhead lines, and other facilities equipment, to protect electrical, cable, telecommunications, and other service lines and related equipment from weather damage, vehicle accident damage and other causes in order to reduce service interruption to residents, to improve the operational reliability of those utilities, to enhance existing and potential business development along

Telegraph Road, and to improve the City's aesthetic environment through the removal of unsightly poles, lines, wires, and related overhead facilities equipment.

A municipality's financial contribution is not limited to the expenses of modifications or improvements to the roads, sidewalks and physical infrastructure itself, but also includes costs related to property acquisition, easement acquisition, appraisals, engineering, legal costs, administrative expenses and other intangible costs associated with construction. According to the City of Taylor's Telegraph Reconstruction chart, attached to Appellee's Appendix at p. 94b, the total projected cost of the reconstruction project was approximately $33 million, of which $10.3 million related to Detroit Edison and the relocation of its lines and facilities. Without factual support, Detroit Edison now claims its total cost is $14.5 million. Regardless of whether Detroit Edison's expense figures are accurate, what is clear is that the utility's contribution is only part of the overall public improvement project cost along Telegraph Road. The City of Taylor's total project cost, separate and apart from relocation of utilities, is approximately $19 million.[2]

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[2] A record of the City of Taylor's expenditures on this project is a matter of public record and kept in the usual course by the City such that the Court can take judicial notice of it. As stated in MRE 201(e), "Judicial notice may be taken at any stage of the proceeding." The Court of Appeals has taken judicial notice of a rise in the consumer price index, *Thomas* v *Thomas*, 176 Mich App 90, 93 (1989), and the general rising cost of real estate, *Hostetler* v *Hostetler*, 46 Mich App 724, 727 (1973). This Court has, on numerous occasions, taken judicial notice of certain facts including cost of living increases, paces of inflation, cost of construction increases, etc. (See cases collected in West's Michigan Digest 2d Evidence, Key No. 18 and 20). Moreover, in the context of governmental affairs, see West's Michigan Digest 2d Evidence, Key No. 23 wherein this Court took judicial notice of several municipal-related activities. See, e.g., *Gableman* v *Dept of Conservation*, 309 Mich 416, 423 (1944), where the Court stated, "The Court will take judicial notice of the fact that considerable public funds have been expended in advertising Michigan as a summer playground...large sums are spent annually in the upkeep of public parks and playgrounds."

Similarly, the City of East Grand Rapids in Kent County, Michigan recently embarked on a public improvement project in its downtown shopping district known as Gaslight Village, which involved relocating utilities pursuant to a city ordinance and other governing law. Attached hereto as Exhibit A is the Affidavit of Brian Donovan, City Manager for the City of East Grand Rapids, which describes the project and its related costs.

The East Grand Rapids project included significant infrastructure improvements made to Wealthy Street in Gaslight Village, including new water hookups, installation of new sidewalks, new street signals, the addition of a sidewalk ice melt system, replacement of street lights, gas lights, planters, safety and sight distance realignment, additional parking, new curbs and curb cuts, and the relocation of utility poles and related wires and facilities. Donovan Affidavit, Exhibit A, ¶ 6. Overhead utilities were removed, including electric, cable television, telecommunications, and other lines and wiring which ran along, across, and adjacent to Wealthy Street and adjacent property. The utility poles, wiring, and related facilities were owned by Consumers Energy Company and SBC Michigan and relocated to poles that were installed on the back side of the buildings that line East Grand Rapids' shopping district. Donovan Affidavit, Exhibit A, ¶ 8.

On or about March 18, 2005, the City of East Grand Rapids passed a new ordinance entitled "The Wealthy Street Improvement and Relocation of Overhead Lines Ordinance," a copy of which is attached to the Donovan Affidavit. Donovan Affidavit, Exhibit A, ¶ 4. The ordinance set forth the public safety, public health, and general welfare reasons why the City was exercising its constitutional right and police power to relocate the utility poles and

related wiring outside of the right-of-way. Donovan Affidavit, Exhibit A, ¶ 9. Although the City could have elected to have the overhead utility lines from Wealthy Street relocated to underground facilities, it chose instead to relocate the poles and continue with aerial electrical and telecommunication facilities by placing the poles behind the storefronts and not along Wealthy Street in the main shopping district. Numerous considerations were taken into account by the City in reaching the decision to complete an aerial-to-aerial relocation rather than requiring underground placement of the utilities, including, but not limited to, the length of construction, associated construction delays, disruption of foot and vehicular traffic, public safety issues, the existence of other aerial utilities lines on neighboring streets, and other issues. Donovan Affidavit, Exhibit A, ¶ 12.

Notably, the total cost of reconstruction of the Wealthy Street public improvement project to date is approximately $2.7 million, whereas the cost associated with the relocation of utility poles, lines, and wiring was $510,000. Donovan Affidavit, Exhibit A, ¶¶ 13-14.

The East Grand Rapids public improvement project in Gaslight Village is instructive for a number of reasons. First, as set forth in the Affidavit of the City Manager, Brian Donovan, the City of East Grand Rapids needed substantial public monies to pay for the large majority of the improvement project, separate and apart from utility relocation expenses. Second, as with the improvements along Telegraph Road in the City of Taylor, public improvement projects often involve far more than relocating utility lines. In the example of East Grand Rapids, the City was deconstructing and reconstructing its entire downtown area, including moving curbs and curb cuts, installing new sidewalks, installing

new street lights, repaving the road, installing drains and public sewer lines, realigning certain streets, creating parking areas, installing planters, and making other improvements. At the same time, it appeared reasonable for the City to relocate the utility poles and the related lines and overhead facilities to a location outside of the City's right-of-way. The relocation of the poles resulted in an improvement in sight lines for traffic, decreased the likelihood of car accidents, increased public safety during ice storms and otherwise, and addressed numerous other public safety and welfare concerns. Third, the East Grand Rapids example highlights the fact that, contrary to Appellant's and its supporters' theory, municipalities will not automatically demand the relocation of aerial facilities to an underground location when given the option. In some cases, such as in East Grand Rapids, relocation of utilities underground is not necessary, not desired, and not requested, despite the municipality having no obligation to pay for the associated costs pursuant to governing law, including Const. 1963, art. 7, § 29, the City's Ordinance, MCL 117.4h(1), (2), and (3), and other applicable law.

The doomsday scenario and scare tactics utilized by Defendant-Appellant and its supporters also extend to their estimates of utility relocation expenses. The Detroit Edison Company, for example, has stated that the relocation of its utility lines in the City of Taylor cost $14.5 million for 4 miles of underground utility placement. Appellant's Brief, p. 38.

The Telecommunications Association of Michigan ("TAM") has stated that the aggregate costs to its members and the customers they serve of relocation expenses could equal "tens of billions of dollars." (emphasis supplied). *Amicus Curiae* Brief of Telecommunications Association of Michigan in Support of Appellant, page 2. Previously,

however, TAM estimated those aggregate costs could equal "hundreds of billions of dollars." (emphasis supplied). *Amicus Curiae* Brief of The Telecommunications Association of Michigan in Support of Detroit Edison's Application for Leave to Appeal, p. 3. Regardless, TAM's estimates also appear to be based on requiring undergrounding of over 100,000 miles of telecommunications lines in Michigan.

SBC Michigan, the largest member of The Telecommunications Association of Michigan ("TAM"), "has calculated the average cost to relocate one mile facilities in a road right-of-way from an aerial to an underground location at approximately $274,000." TAM's Brief in Support of Edison's Application for Leave to Appeal, page 2. Consumers Energy Company, the Michigan Electric and Gas Association, and the Michigan Electric Cooperative Association have estimated the cost per mile at $100,000. Joint Motion for Leave to File Amicus Curiae Brief in Support of Application for Leave, p. 6. These figures appear far more realistic than Detroit Edison's figures, the majority of which may be site specific.

In the final analysis, the figures quoted by Detroit Edison and its supporters are not supported by the factual record in this case, wildly inconsistent, inflated to the extreme, and of little benefit. This case is not about a beautification ordinance requiring all utility lines in a city to be relocated. The record shows public health and safety concerns in the City of Taylor along Telegraph Road, including a history of accidents involving contact with poles in a heavily traveled business district. Appellee's Appendix shows a history of accidents, a high traffic volume, a large public improvement project, and a huge financial investment by

the City and also the State, all of which are unlikely to be replicated in numerous other instances.

Municipalities are not proceeding with large public improvement projects *en masse* because they do not have the public finances to do so. As a result, there is no rush to relocate utility lines to underground locations and the threat to the contrary as a means to convince the Court to overturn the Court of Appeals' decision is a "sky is falling" argument that does not consider the real world financial constraints under which Michigan's municipalities are currently operating.

CONCLUSION AND RELIEF REQUESTED

For the last century, Michigan's townships, cities and villages have acted in reliance on their constitutional rights, their police powers, and the limited, regulatory role of administrative agencies like the MPSC. Detroit Edison seeks to broadly expand utilities' rights and MPSC jurisdiction to the detriment of the constitutional rights guaranteed to Michigan's municipalities. The Michigan Municipal League and the Michigan Townships Association believe that the Court should affirm the decision below, and confirm the broad authority granted to Michigan's municipalities by Const 1963, art 7, § 29.

To the extent that the Court wishes to adopt a narrower holding in this matter, the Court should find that under the facts presented, where a municipality required undergrounding of utility lines in a heavily congested area, where undergrounding was required as part of a major public improvement project, where there was a history of public safety issues, where substantial public finances were devoted to the project, and where public safety, health, and welfare considerations were taken into consideration, the City of Taylor acted within its constitutional and statutory rights and reasonably under the circumstances by requiring Detroit Edison to relocate the utility lines and facilities underground and pay for the relocation.

For the foregoing reasons, *Amicus Curiae* the Michigan Municipal League and the Michigan Townships Association respectfully request that the Court affirm the judgment of the Court of Appeals and grant Plaintiff-Appellee City of Taylor such other relief as is equitable and just.

Respectfully submitted,

LAW, WEATHERS & RICHARDSON, P.C.

By David W. Centner

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IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges: William B. Murphy, Richard Allen Griffin, and Helene N. White

CITY OF TAYLOR,

Plaintiff-Appellee,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellant.

Supreme Court No. 127580

Court of Appeals No. 250648

Wayne County Circuit Court
No. 02-221723-CZ

_____/

AFFIDAVIT OF BRIAN DONOVAN, CITY MANAGER
CITY OF EAST GRAND RAPIDS, MICHIGAN

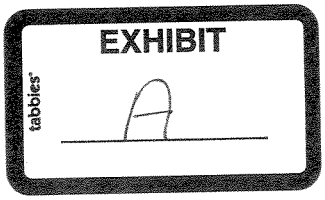
I, Brian Donovan, make this affidavit based upon my personal knowledge, information, and belief. I can competently testify to the facts contained in this affidavit if called upon to do so.

1. I am the City Manager of the City of East Grand Rapids, Michigan (the "City").

2. The City of is a municipal corporation organized and existing under the laws of the state of Michigan and located in Kent County, Michigan.

3. The City is a Home Rule City with its own city charter.

4. Effective March 18, 2005, the City passed a new ordinance entitled the "Wealthy Street Improvements and Relocation of Overhead Lines Ordinance" (the "Ordinance"). A copy of the City's Ordinance is attached to this affidavit as Exhibit A.



5. At the time of the passage of the Ordinance, the City was in the process of redesigning and planning for a major reconstruction of a portion of Wealthy Street, which runs between Lakeside Drive and Lovett Street, in the City's main shopping district known as Gaslight Village.

6. As part of the reconstruction project, significant infrastructural improvements were made to Wealthy Street and Gaslight Village, including new water hookups, installation of new sidewalks, street signals, the addition of a sidewalk ice melt system, placement of new street lights, gas lights, planters, safety and sight distance realignment, and the relocation of certain overhead utilities.

7. The overhead utilities which were moved pursuant to the reconstruction project included electric, cable television, telecommunication, and other lines and wires which ran along, across, and adjacent to and/or over streets in the Wealthy Street improvement area and on adjacent property and the related utility poles.

8. The utility poles, wiring and related facilities were owned by Consumers Energy Company and SBC Michigan.

9. The governmental functions and purposes of the relocation of overhead lines and wires, including the removal of utility poles and related overhead facilities and equipment, including numerous health, safety, and welfare concerns of the City, including the following:

(1) To allow for the public improvement of the reconstruction and repair of certain streets within Gaslight Village, and improvement and repair of related infrastructure including sidewalks, water mains, sewers and street lighting;

(2) To relieve the utility, transportation and infrastructural burden in the Wealthy Street Improvement Area, which is a congested business district in the city, serving dozens of businesses and accommodating thousands of vehicles daily traveling along Wealthy Street and into and out of these businesses, as well as the High School and the community pool, on a daily basis, and Memorial Football Field and the Performing Arts Center, on at least a weekly basis, as well as regularly scheduled special community events;

(3) Improvement of the city's aesthetic environment through removal of unsightly poles, lines, wires and related overhead facilities equipment out of view of the public;

(4) Enhancement of traffic operational safety in the city by the removal of utility poles and overhead lines, wires and related overhead facilities equipment in order to improve visibility, sight lines and eliminate vehicular accident impacts on poles, overhead lines and wires and other overhead facilities equipment;

(5) To better protect electrical, cable, telecommunications and other service lines, wires, poles and related overhead facilities equipment from vehicle accident damage and other causes, in order to reduce service interruptions to residents of and businesses located in the city;

(6) Enhancement of the safety of city residents and persons traveling in the Wealthy Street Improvement Area from falling or down lines, wires, poles and overhead facilities equipment; and

(7) Enhancement of existing and potential business development and other land in the Wealthy Street Improvement Area recognizing the historical pattern of development including different (a) physical location of buildings and curb cuts, (b) set backs, (c) location of and limits to rights-of-way, and (d) location of utility poles and overhead lines and wires.

10. The Ordinance provides that the City has the power and authority to enact the Ordinance pursuant to, among other sources, the Michigan Constitution

(Article 7, Section 29), the Home Rule Cities Act, P.A. 279 of 1909 (as amended), the City's charter (Chapter XIII, Section 13.1 and Chapter XIV, Sections 14.1 and 14.6), the City Code (Title IV), various other ordinances, existing legal precedence, applicable MPSC rules, and the City's general police power to protect the public health, safety, and general welfare.

11. Although the City could have elected to have the overhead utility lines from Wealthy Street relocated to underground facilities, it chose instead to relocate the poles and continue with aerial electrical and telecommunication facilities which were placed behind the storefronts and not along Wealthy Street in the main shopping district.

12. Numerous considerations were taken into account by the City in reaching the decision to have an aerial-to-aerial relocation rather than an aerial-to-underground relocation, including, but not limited to, length of construction, associated construction delays, disruption to foot and vehicular traffic, public safety issues, existence of other aerial electrical and telecommunication utility lines and related equipment on neighboring streets, and other issues.

13. The total cost of relocating Consumers Energy's utility poles, lines, wires, and related facilities was approximately $403,000, and the cost to relocate SBC Michigan's equipment was approximately $107,000.

14. The total cost of the reconstruction of the Wealthy Street shopping district was approximately $2.7 million, not including the costs set forth above regarding Consumers Energy and SBC Michigan.

15. The City would not have relocated the utility lines, wiring, poles and related equipment to outside the Wealthy Street right-of-way if the City had not had the financial resources and approval of its citizens to proceed with the City's overall improvement project of Gaslight Village.

FURTHER AFFIANT SAYETH NOT.

Brian Donovan

Brian Donovan

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

The foregoing instrument was acknowledged before me this ____ day of February, 2006, by Brian Donovan who is personally known to me or who has produced his drivers license as identification.

SALLY A. BODE
Notary Public, State of Michigan, County of Kent
My Commission Expires August 15, 2010
Acting in the County of Kent

Sally Bode
SALLY BODE
Notary Public, Kent County, Michigan
Acting in Kent County
My commission expires: August 15, 2010

AN ORDINANCE TO ADD ARTICLE VII TO CHAPTER 41 OF TITLE IV OF THE CODE OF THE CITY OF EAST GRAND RAPIDS

THE CITY OF EAST GRAND RAPIDS ORDAINS:

Section 1. A new Article VII is added to Chapter 41 of Title IV of the Code of the City of East Grand Rapids to read in its entirety as follows:

"ARTICLE VII
WEALTHY STREET IMPROVEMENTS AND RELOCATION OF OVERHEAD LINES

Sec. 4.31 **Wealthy Street improvements.**

(1) **Title.** This article shall be known and may be cited as the 'Wealthy Street Improvements and Relocation of Overhead Lines Ordinance.'

Sec. 4.32 **Legislative findings and purpose.**

A. The City of East Grand Rapids (the 'city') is currently in the process of designing and planning for the major reconstruction of the portion of Wealthy Street, running between Lakeside Drive and Lovett in the city, a portion of Bagley Street from Wealthy Street to 150 feet south, a portion of Croswell from Wealthy Street to 280 feet south, and a portion of Lovett from Wealthy Street to 210 feet south and to 130 feet north, all within Gaslight Village (the Wealthy Street Improvement Area). In addition, the city intends to make other infrastructural improvements to the Wealthy Street Improvement Area, including new water hookups, utilities, installation of new sidewalks, street signals and a sidewalk ice melt system, placement of new streetlights, gaslights, planters, as well as safety and sight distance realignment.

B. As part of the process of improving the Wealthy Street Improvement Area and its related infrastructure, the city has determined that it is a necessary public improvement to relocate all overhead electric utility, cable television, telecommunication and other lines and wires currently running along, across, adjacent to and/or over streets in the Wealthy Street Improvement Area and adjacent private property. In connection with this line and wire relocation, the city has determined that all poles and related overhead facilities equipment to the

overhead lines should also be removed to the maximum extent possible.

C. The City finds, based on the Aerial Utility Evaluation Report for Wealthy Street Between Lakeside Drive and Lovett Street by Classic Engineering & Power Systems Solutions, that over 80% of the poles and associated components need either repair or replacement, wiring rework, tree trimming, guying repaired or replaced, or accessories replaced, as the result of internal and external decay, age, rust, deteriorated insulation, excessive splicing, "rat's nest" wiring, improper height, and broken or missing conduit boxes. Standard installation practices and sound engineering solutions have been violated in utilization of the poles.

D. The governmental functions and purposes of this relocation of overhead lines and wires and removal of poles and related overhead facilities equipment include, but are not limited to, the following public health, safety and welfare concerns of the city:

(1) To allow for the public improvement of the reconstruction and repair of that portion of Wealthy Street between Lakeside Drive and Lovett in the city, a portion of Bagley Street from Wealthy Street to 150 feet south, a portion of Croswell from Wealthy Street to 280 feet south, and a portion of Lovett from Wealthy Street to 210 feet south and to 130 feet north, all within Gaslight Village, and improvement and repair of related infrastructure including sidewalks, water mains, sewers and street lighting.

(2) To relieve the utility, transportation and infrastructural burden in the Wealthy Street Improvement Area, which is a congested business district in the city, serving dozens of businesses and accommodating thousands of vehicles daily traveling along Wealthy Street and into and out of these businesses, as well as the High School and the community pool, on a daily basis, and Memorial Football Field and the Performing Arts Center, on at least a weekly basis, as well as regularly scheduled special community events.

(3) Improvement of the city's aesthetic environment through removal of unsightly poles, lines, wires and related overhead facilities equipment out of view of the public.

(4) Enhancement of traffic operational safety in the city by the removal of utility poles and overhead lines, wires and related overhead facilities equipment in order to improve visibility, sight lines and eliminate vehicular accident impacts on poles, overhead lines and wires and other overhead facilities equipment.

(5) To better protect electrical, cable, telecommunications and other service lines, wires, poles and related overhead facilities equipment from vehicle accident damage and other causes, in order to reduce service interruptions to residents of and businesses located in the city.

(6) Enhancement of the safety of city residents and persons traveling in the Wealthy Street Improvement Area from falling or down lines, wires, poles and overhead facilities equipment.

(7) Enhancement of existing and potential business development and other land in the Wealthy Street Improvement Area recognizing the historical pattern of development including different (a) physical location of buildings and curb cuts, (b) set backs, (c) location of and limits to rights-of-way, and (d) location of utility poles and overhead lines and wires.

D. The city has the power and authority to enact this article pursuant to, among other sources, the Michigan Constitution (Art 7, Sec 29), the Home Rule Cities Act, P.A. 279 of 1909, as amended, the East Grand Rapids City Charter (Chapter XIII, Sec. 13.1 and Chapter XIV, Secs. 14.1 and 14.6), the East Grand Rapids City Code, Title IV, various ordinances and franchise and consent agreements related to cable television, telecommunications, existing legal precedent, applicable MPSC rules and the city's general police power to protect the public health, safety and general welfare.

Sec. 4.32 **Relocation directed.** Upon the adoption of this article and upon written notice from the city, all public utilities, telecommunications providers, cable television providers (collectively the 'companies'), state and county agencies ('agencies') and all other individuals, firms, partnerships, associations, companies, corporations or entities ('persons') who own, lease, operate and/or maintain overhead lines and wires, poles and/or related overhead facilities equipment located along, across, over and/or adjacent to or

otherwise located within the Wealthy Street Improvement Area or on adjacent private property, are hereby directed and ordered to begin immediately to relocate all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the city. In complying with this paragraph, the companies, agents and persons shall also fully comply with the East Grand Rapids City Code, all related franchise and consent agreements or other contracts, and any applicable state law.

Sec. 4.33 **Cooperation directed.** In connection with compliance with the requirements of Section 4.32 above, all companies, agencies, persons and representatives of the city shall cooperate fully and in good faith with each other in the timely coordination and implementation of the planning, design, construction and completion of the street reconstruction and infrastructure improvements, including the relocation of overhead lines and wires, and the removal of poles and related overhead facilities equipment in the Wealthy Street Improvement Area. The timetable for completion of work set forth in this Section and in Section 4.32 shall be established solely by the city in consultation with the companies, agencies and other persons.

Sec. 4.34 **City contribution.** The city may, in its sole discretion, make contributions to the work required in Sections 4.32 and 4.33 above, including acquiring all necessary easements and rights-of-way. In order to facilitate this property acquisition, the city may in its discretion, exercise its powers of eminent domain.

Sec. 4.35 **Retention of control of public places.** Nothing contained herein shall be construed to alienate the title of the public in and to any public rights-of-way or any portion thereof, nor shall anything herein be construed in any manner as constituting a surrender by the city of its general powers with respect to the subject matter hereof, or with respect to any matter whatsoever, or in any manner be construed as limiting the right of the city to regulate the use of and access to any public rights-of-way within its exclusive or concurrent jurisdiction and to otherwise exercise its police powers to protect the public health, safety and welfare.

Sec. 4.36 **Sanctions and penalties.** Violation of any provisions of this article shall be a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), or by imprisonment for not more than ninety (90) days, or both such fine and imprisonment. Each day of a continuing violation, as determined by the city upon prior written notice to the violator, may be charged and punished as a separate and distinct offense."

Section 2. This Ordinance shall be effective on MARCH 18, 2005.

Section 3. This Ordinance shall be published in full pursuant to the provisions of Chapter VII, Section 7.5 of the Charter of the City of East Grand Rapids.